No. SC86737

IN THE SUPREME COURT OF MISSOURI

DALE M. DOBBINS
PLAINTIFF- APPELLANT

Vs.

STATE OF MISSOURI
DEFENDANT-RESPONDENT

APPEAL TO THE SUPREME COURT OF MISSOURI.
FROM THE CIRCUIT COURT OF SALINE COUNTY MISSOURI.
FINDINGS OF FACTS AND CONCLUSIONS OF LAW.
JUDGE JAMES T. BELLAMY

APPELLANT'S AMENDED SUBSTITUTE BRIEF

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DALE M. DOBBINS

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Defendant-Respondent

JURISDICTIONAL STATEMENT

Mr. Dobbins was delivered to the Missouri Department of Corrections on August 31, 2001. He filed a timely motion under Sup. Ct. R. 24.035, on November 27, 2001, in the Circuit Court of Saline County, Missouri. L.F. p. 5. Judgment denying relief was entered on May 21, 2003. L.F. p. 39. Notice of appeal was timely filed on June 30, 2003. L.F. p. 46.

The Court of Appeals affirmed the denial of post-conviction relief February 22, 2005. On May 31, 2005, this court ordered that Mr. Dobbins's appeal be transferred from the Missouri Court of Appeals, Western District. Supreme Court Rule 83.03 Article V, Section 10, vests jurisdiction in the Supreme Court of Missouri the same as if the case were heard on original appeal.

STATEMENT OF FACTS

On September 27, 2000, 3:00 A.M., an officer of the Slater, Missouri Police Department observed a pickup truck, with a camper shell, driven by Mr. Dobbins, speeding. Supplemental Legal File pages 10 & 11. (To be noted as Supp. L.F. p.) . The officer pulled the truck over and arrested Mr. Dobbins for speeding, for driving with a suspended drivers license, and failure to maintain financial responsibility. Supp. L.F. pp.11-12. During the stop the officer noticed a strong odor, of which he believed was a skunk, emanating from the area. Supp.L.F. pp. 12-13. While waiting for a tow truck, the officer conducted a search of the pickup truck, starting with the passenger compartment. After looking under floor mats and numerous personal items of Mr. Dobbins and finding nothing of interest, the officer turned to the camper shell. Supp. L.F. p. 20. The windows of the camper shell being opaque, the officer was forced to open the rear of the pickup, finding three large trash bags filled with a green leafy substance. Supp. L.F. p. 15.

On October 17, 2000, Mr. Dobbins was indicted in the Circuit Court of Saline County with the Class A felony of drug trafficking in the second degree, Stat. 195.223, (possession of more than 30 kilos of marijuana), or

in the alternative possession of more than 5 grams of marijuana with the intent to distribute, Stat. 195.211. Supp. L.F. p.1.

Trial counsel filed a motion to suppress evidence seized in the search of Mr. Dobbins's vehicle, which was denied after a hearing. Supp. L.F. p. 4. Trial counsel testified at a Postconviction Remedy, (To be noted as PCR.), evidentiary hearing that he believed that the motion to suppress was a close question which had merit. PCR Transcript pages 37-38. (To be noted as Tr. pp.). In an offer of proof which was refused by the trial court, trial counsel also testified that in overruling the motion, "Judge Rolf made the comment that he thought the motion had more merit than he realized after he read our suggestions. Obviously he was not persuaded, but he acknowledged that the motion was stronger than he assumed at first. PCR. Tr. p.41.

Mr. Dobbins's trial counsel entered into plea negotiations with the State, which produced an offer where the State would recommend a sentence of 10 years with no probation on the charge of possession of more than 5 grams of marijuana with the intent to distribute, would not charge him as a persistent offender, or prior or persistent drug offender; recommend a sentence of 2 days concurrent on Count II; and dismiss count III. State's Exhibit 1, Petition to Enter Guilty Plea, p.4. Trial counsel advised Mr. Dobbins to reject this offer. PCR. Tr. p. 8.

In advising Mr. Dobbins to reject the State's offer counsel's strategy was threefold, that 1) The State would not enhance the sentence, Supp. L.F. p. 80, and from past experience he believed that the court would not sentence him to a sentence as harsh as the 10 years offered by the state in this kind of case. PCR Tr. p. 8. 2). Trail counsel would more likely than not get the court to sentence Mr. Dobbins to a long-term treatment program pursuant to 217.362. Supp. L.F. pp. 71,54, 49, PCR. Tr. pp.30-31. 3) If the sentence should turn out to be greater than the offered 10 year sentence, Mr. Dobbins would still be eligible for a sentence reduction pursuant to Stat. 558.046, PCR. Tr. p. 31, after completion of a short- term substance abuse program while in the department of corrections. PCR. Tr. p. 10.

In rejecting the plea offer the State filed an information lieu of the indictment on June 12, 2001, charging Mr. Dobbins as a prior drug offender pursuant to statute 195.291, with the Class B felony of trafficking in the second degree (possession of more than 30 kilos) or in the alternative possession of more than 5 grams of marijuana with intent to distribute. Supp. L.F. p. 6. Prior to this the penalty range Mr. Dobbins faced was 5 to 15 years for a Class B felony. After the prior drug offender charge was issued, Mr. Dobbins faced a range of 10 to 30 years or life imprisonment for a Class A felony range of sentencing. Sup. L. F. p. 6. The State announced that,

since the plea was open, it would defer making its recommendation as to sentence length until time of sentencing. Supp. L. F. p. 70.

Had counsel known that a reduction was not available under 558.046 his advice about the open plea would have been different. PCR. Tr. pp. 8, 10. Mr. Dobbins testified that had he known that he could not receive a sentence reduction; he would have ether have accepted the plea offer or went to trial. PCR. Tr. pp. 46, 58.

As a factual basis for the plea. The State recited Mr. Dobbins's prior conviction and, without discussion of its contents, offered State's Exhibit 1. Supp. L.F. pp. 66-68. The exhibit describes the seizure of green marijuana and garden tools from Mr. Dobbins's vehicle, and indicated that the weight of the marijuana was approximately 20 pounds before removal of stalks and seeds. There were no scales, packaging materials, money or other evidence seized which would indicate that Mr. Dobbins intended to distribute the marijuana. States Exhibit 1, "EVIDENCE THE STATE WOULD PRESENT AT TRIAL".

During the plea proceedings, trial counsel requested that Mr. Dobbins be sentenced to a drug treatment program, which would have permitted his release on probation after he completed the program pursuant to Stat. 217.362. The court responded "That is an option." Supp. L.F. p. 71. At

sentencing trial counsel again asked the judge to sentence Mr. Dobbins to long-term treatment. The judge responded, "Somebody his age is not the kind of person we need to be using those beds for. I think that's better suited for somebody younger." Supp. L. F. p. 54. Mr. Dobbins was born in 1956, and was 45 years old at the time of sentencing. Supp. L.F. p. 58.

Mr. Dobbins petitioned the Saline County Circuit Court for relief pursuant to Supreme Court Rule 24.035 on November 21, 2001. Relief was denied by the motion court on May 21, 2003. An appeal was filed in the Western District Court of Appeals. The appellate court affirmed the judgment of the motion court on Febuary 22, 2005. This Court accepted transfer May 31, 2005, pursuant to Rule 83.03. This appeal follows.

POINT RELIED ON I

THE MOTION COURT CLEARLY ERRED IN REFUSING TO GRANT MR. DOBBINS A NEW SENTENCING PROCEEDING IN THAT HE WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10, OF THE MISSOURI CONSTITUTION WHEN THE TRIAL COURT REFUSED TO CONSIDER SENTENCING MR. DOBBINS TO LONG-TERM TREATMENT UNDER STATUTE 217.362 BECAUSE OF HIS AGE.

Rev. Mo. Stat. 217.362

Massachusetts Board of Retirement v. Murgia, 96 S.Ct. 2562 (1976)

United States v. Maples, 501 F.2d 985 (4th Cir. 1974)

Rockwood Bank v. Gaias, 170 F.3d 833 (8th Cir. 1999)

POINT RELIED ON II

THE MOTION COURT ERRED IN DENYING POST-CONVICTION RELIEF IN THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MIS-ADVISED MR. DOBBINS AS TO THE CONSEQUENCES OF A PLEA OF GUILTY AND RECOMMENDED THAT HE ENTER SUCH A PLEA. PREJUDICE RESULTED BECAUSE HAD TRIAL COUNSEL AND MR. DOBBINS NOT ERRONEOUSLY BELIEVED THAT MR. DOBBINS COULD OBTAIN A SENTENCE REDUCTION UNDER MO. REV. STAT. 558.046, MR. DOBBINS WOULD NOT HAVE ENTERED AN OPEN PLEA OF GUILTY.

Rick v. State, 934 S.W.2d 601 (Mo. App. 1996)

Hill v. Lockhart, 877 F.2d 698 (8th Cir. 1998)

State v. Ayres, 93 S.W. 827 (Mo. App. E.D. 2002)

Garmon v. Lockhart, 938 F.2d 120 (8th Cir. 1991)

POINT RELIED ON III

THE MOTION COURT ERRED IN REFUSING TO SET ASIDE MR. DOBBINS'S PLEA OF GUILTY IN THAT MR. DOBBINS'S CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW BECAUSE THE TRIAL COURT ACCEPTED HIS PLEA OF GUILTY WITHOUT DETERMINING THAT IT WAS SUPPORTED BY A FACTUAL BASIS.

Sup Ct. Rule 24.02 (e)

Saffold v. State, 982 S.W. 2d 749 (Mo. App. 1998)

State v. May, 71 S.W. 3d 177 (Mo. App. 2002)

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THE MOTION COURT ERRED IN DENYING POST-CONVICTION RELIEF IN THAT MR. DOBBINS WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN TRIAL COUNSEL FAILED TO OBJECT TO THE COURT'S FINDING MR. DOBBINS GUILTY WITHOUT A FACTUAL BASIS FOR HIS PLEA OF GUILTY. PREJUDICE RESULTED BECAUSE HAD SUCH AN OBJECTION BEEN MADE, THERE IS A REASONABLE PROBABILITY THAT THE TRIAL COURT WOULD NOT HAVE ACCEPTED MR. DOBBINS'S PLEA OF GUILTY.

State v. Mizanskey, 991 S.W. 2d 95 (Mo. App. 1995)

Rev. Mo. Stat. 195.010 (24)

United States v. Murray, 753 F.2d 612 (1985)

ARGUMENT POINT I

THE MOTION COURT CLEARLY ERRED IN REFUSING TO GRANT MR. DOBBINS A NEW SENTENCING PROCEEDING IN THAT HE WAS DENIED DUE PROCESS AND EQUAL PROTECTION OF THE LAW UNDER THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND ARTICLE 1, SECTION 10 OF THE MISSOURI CONSTITUTION WHEN THE TRIAL COURT REFUSED TO CONSIDER SENTENCING MR. DOBBINS TO LONG-TERM TREATMENT UNDER STATUTE 217.362, BECAUSE OF HIS AGE.

For review of the motion court's denial of a 24.035 motion, the question before the Supreme Court is, "whether the findings, conclusions and judgment of the trial court are clearly erroneous." State v. Rose, 440 S.W. 2d 441 S.Ct. (1969).

Facts pertinent to resolving this claim start at the plea proceeding. There, trial counsel asked the court to sentence Mr. Dobbins to drug treatment. The court noted the request and responded: "I understand and that is an option." Supp. L.F. p. 71. As a result Mr. Dobbins had a reasonable belief that drug treatment could be imposed as a consequence of maintaining the open plea of guilty.

The treatment program that Mr. Dobbins sought was created in response to the legislature, i.e., "The department of corrections shall design and implement an intensive long-term program for the treatment of chronic nonviolent offenders with serious substance abuse addictions..." 217.362.1.[1]

"Prior to sentencing any judge considering an offender for this program shall notify the department. The department shall, by regulation, establish eligibility criteria and inform the court of such criteria." 217.362.2.

Despite the earlier indication regarding treatment, at sentencing, and much to Mr. Dobbins's surprise, the trial court ignores the previous request for treatment and imposed a sentence of eighteen (18) years imprisonment. Subsequently, counsel again asked the court to impose the treatment program. In a direct response to this request the court stated: "Somebody his age is not the kind of person we should be using those beds for. I think that's better suited for somebody younger." Supp.L.F. p. 54. See State v. Smulls, 935 S.W. 2d 9 (Mo. Banc 1996). Holding that statements must be considered in the context in which they are offered. Id at 26, and West v. Conopco Corp., 974 S.W. 2d 554 (Mo. App. 1998). Finding that age discrimination may be established by direct or circumstantial evidence.

Rarely, will a judge make such a candid disclosure of bias as in this case. See also United States v. Maples, 501 F.2d 985 (1974), where the court

[1] All RSMo.s are 2000 unless otherwise noted.

reversed the sentence that Maples received because his codefendant received a lesser sentence on the basis of gender. In that case the court stated: "I just don't believe in punishing a woman who participates in a crime on the same basis as the man." Id at 986.

In Mr. Dobbin's case the evidence is direct and concrete. The context of the court's statements are clear, 1) "Somebody his age" would not be considered for treatment but, he could be treated if he were "somebody younger."

Mr. Dobbins, born in 1956, was forty five (45) years old at the time of sentencing. Supp. L.F. 58. If the legislative intent had found a rational basis to exclude individuals by age under statute 217.362, there would be an age restriction in the statutes eligibility criteria. For example, the legislature has placed an age restriction in statue 217.345. The criteria provides for "physical separation of offenders who are younger than seventeen years of age from offenders who are seventeen years of age or older." 217.345.2. "The court recognizes that the drawing of lines that create distinctions is peculiarly a legislative task." Massachusetts Board of Retirement v. Maargia, 96 S.Ct. 2562, 2567 (1976).

Although Mr. Dobbins does not have a right to treatment, Goforth v. Missouri Department of Corrections, 62 S.W. 3d 556, 568 (Mo. App. W.D. 2001), he does have an equal protection right to have the decision, of whether to impose treatment, made without discrimination on the basis of his age. See

Williams v. Meese, 926 F. 2d 944 (10th Cir. 1991). Holding that Williams had no particular right to a prison work assignment. However, Williams had a right to have the prison make a decision about his work assignment without discrimination on the basis of his age; quoting Bentley v. Beck, 625 F.2d 70 (5th Cir. 1980). Bentley was told that he could not work in the jail's kitchen because he was a "white boy." The court held that Bentley had a constitutional right to be free from racial discrimination.

The sentencing court could have cited reasons other than Mr. Dobbins's age to deny treatment but, the court specifically stated his age as the only factor in determining whether Mr. Dobbins would receive treatment. See Rockwood Bank v. Gaia, 170 F. 3d 833, 842 (8th Cir 1999). Holding that when the prohibited factor is the determining factor and not merely a part of the determination improper discrimination is shown.

Here the court violated the very essence of the code of judicial conduct under Missouri Supreme Court Rule 2.03 Canon 3b (5), which holds that a judge must "perform judicial duties without bias or prejudice. A judge in the performance of his judicial duties, shall not by words or conduct manifest bias or prejudice, including but not limited to prejudice based upon race, sex, religion, national origin, disability, or age..." This is because discrimination in the context manifest by the sentencing court here is prohibited by the Du Process and Equal Protection Clauses under the Fourteenth Amendment of

United States Constitution and Article 1, Section 10 of the Missouri Constitution. Counsel should have, in the very least, objected to the court's use of a discriminatory motive in foreclosing consideration of treatment. After all, it was counsel's strategy under the open plea, to an enhanced sentence, to have the court sentence Mr. Dobbins to treatment. See Point II infra.

On November 21, 2001, Mr. Dobbins sought relief and petitioned the Saline County Court under Supreme Court Rule 24.035, Legal File page 5. (To be noted as L.F. p.). Mr. Dobbins retained counsel who timely filed an amended motion. L.F. p. 11. An evidentiary hearing was held March 3, 2003. L.F. p. 2.

Subsequently on May 21, 2003, the motion court made its Findings of Facts and Conclusions of Law, denying relief. L.F. p 39-45. As to Mr. Dobbins's claim of age discrimination the court states: 1) The trial court has no control over Movant's course of treatment while in the Missouri Department of Corrections. 2) The entirety of the proceedings reflects that Movant was unsuitable for long-term treatment. 3) Movant had been treated in the past to no avail. 4) Movant's history provided a basis for the denial of his post-sentencing request. 5) Movant presents no evidence that the 18 year sentence was based on any issue other than his extensive criminal history and *social maladjustment.* Emphasis added. L.F. p. 44.

The court's findings here amount to nothing more than mere denial. There are no references to transcript, other than the court's reference to the "entirety

of the proceedings," nor case law to support any of the propositions. "It is not the proper function of the appellate court to act as an advocate for any party on appeal." Osage Water Co. v. City of Osage Beach, 108 S.W. 3d 751, 754-55 (Mo. App. 2003). Mr. Dobbins's extensive criminal history consists of his prior drug related felony conviction used to enhance his sentence. His other convictions are misdemeanor and are drug and alcohol related. The court proposes that he is unsuitable for drug treatment because he has a history of drug use, the very eligibility criteria itself. Supp. L.F. p. 25. Presentence Investigation Report. (To be noted as PSI.)

This is the rare case where the judge verbally expresses his bias to a defendant on the record. The judge's decision not to impose treatment based on age is clear.

In any event what is missing is a determination based on the rational basis standard. L.F. p. 44. The appellate court failed to make this determination as well. Memorandum Opinion page 18. (To be noted as Memo. p).

As a result the lower court's findings here are clearly erroneous under Supreme Court precedent where a claim of age discrimination must be reviewed to determine whether there was a rational for the decision apart from the age of Mr. Dobbins. Massachusetts Board of Retirement v. Murgia, 96 S.Ct. 2562 (1976).

Had the sentencing court properly considered the program, in fact the PSI recommended that Mr. Dobbins receive treatment for substance abuse, Supp. L. F. p 27, devoid age, then imposed treatment, Mr. Dobbins would have been placed on probation after a successful completion. In State ex rel Beggs v. Dormire, 91 S.W. 3d 605 (Mo. Banc 2002), the court sentenced the defendant to long-term treatment under 217.362. Beggs completed the program in 11 months and 20 days. Id at 607. The program usually takes twenty four (24) months to complete but, once the offender completes the program, the sentencing court must place the offender on probation unless it finds that it would be an abuse of discretion. 217.362.3. At this point Mr. Dobbins has served forty eight (48) months, twice the time it takes to complete the program.

In Williams and Bentley the court made it clear that, it is not permitted to use a discriminatory motive in reaching a conclusion as to whether an individual, prisoner or otherwise, will receive a discretionary placement, such as Mr. Dobbins's placement in the treatment program. Like Maples, when the court used a discriminatory motive to deny Mr. Dobbins access to the treatment program his right to equal protection of the law is violated which in turn makes his sentence constitutionally invalid.

As a matter of first impression, no case law was found wherein a Missouri Court, under the specifics of age, has denied a defendant entry into drug treatment under statute 217.362. The court recognizes that it is not necessary

there be a case law examplar for every set of facts for a particular case to apply the controlling legal principals and prevailing rules to the case before it.

Foremost in Mr. Dobbins's claim of age discrimination he has cited Equal Protection of the Law under the Fourteenth Amendment of the United States Constitution, and Article 1, Section 10, of the Missouri Constitution. He has quoted from and cited, in the record, the statements in question. He has cited case law for the controlling legal principals in cases where a discriminatory motive is shown and provided a standard of review for his claim. As such Mr. Dobbins has fairly presented his claim for review by this court. Picard v Connor, 92 S.Ct. 509 (1971), and Duncan v. Henery, 115 S.Ct. 887. Id at 888.

The Western District Court of Appeals skirted the issue deeming this point abandoned. Memo. p. 19. Claims of age discrimination are a structural, which can be raised at any time. See Tumey v. Ohio, 47 S.Ct. 437 (1927), finding a bias judge as a structural error.

No provision for discriminating on the basis of age has been provided in statute 217.362, and Mr. Dobbins met the eligibility criteria. Supp. L.F. p. 27.

For the aforegoing reasons, this court should place Mr. Dobbins on probation for a period of five (5) years and apply all jail and prison time over two years toward his probationary period.

In the alternative Mr. Dobbins's sentence should be vacated and he should be resentenced by a different court using proper sentencing considerations.

ARGUMENT POINT II

THE MOTION COURT ERRED IN DENYING POST-CONVICTION RELIEF IN THAT TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL WHEN HE MIS-ADVISED MR. DOBBINS AS TO THE CONSEQUENCES OF A PLEA OF GUILTY AND RECOMMEND THAT HE ENTER SUCH A PLEA. PREJUDICE RESULTED BECAUSE HAD TRIAL COUNSEL AND MR. DOBBINS NOT ERRONEOUSLY BELIEVED THAT MR. DOBBINS COULD OBTAIN A SENTENCE REDUCTION UNDER MO. REV. STAT. 558.046, MR. DOBBINS WOULD NOT HAVE ENTERED AN OPEN PLEA OF GUILTY.

For review of the motion court's denial of a 24.035 motion, the question before the Supreme Court is, "whether the findings, conclusions and judgment of the trial court are clearly erroneous." State v. Rose, 440 S.W. 2d 441 S.Ct. (1969)

The motion court denied relief on Mr. Dobbins's claim that he received ineffective assistance of counsel rendering his plea involuntary. In so holding, the court revealed a misunderstanding of the standard for determining whether a defendant who entered a plea of guilty has been prejudice by ineffective assistance of counsel and he is therefore entitled to withdraw his plea.

In advising Mr. Dobbins to enter an open plea of guilty, trial counsel relied, among other factors, on his belief that if Mr. Dobbins was sentenced to prison, he could complete a drug treatment program and then apply to the court for a sentence reduction pursuant to Mo. Rev. Stat. 558.046. PCR. Tr. pp. 9-10. This was incorrect. Reduction of sentence is only available to first offenders. Mr. Dobbins has one prior felony conviction.

Counsel's strategy was threefold. First, counsel advised Mr. Dobbins to reject the state's offer of ten years imprisonment, eight years less than Mr. Dobbins actually received. Counsel represented that the state would not charge Mr. Dobbins as a prior or persistent offender, Supp. L.F. p. 81, and the court would not sentence him to as harsh a sentence as the state had offered in the agreement.[2] PCR. Tr. pp. 7-8. Of course, upon rejecting the offer the state charged Mr. Dobbins as a prior offender. Sup. L. F. pp. 80-81.

Second, counsel represented that, without the plea agreement, he was of a greater certainty that he could persuade the court to impose drug treatment as a part of Mr. Dobbins's sentence. PCR. Tr. pp. 31, 56, 58. The drug treatment would allow Mr. Dobbins to be placed on probation after successfully completing the two year program. RSMo. 217.362. State ex rel Beggs v. Dormire, 91 S.W. 3d 605 (Mo. Banc 2002).

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[2] Mr. Dobbins's plea petition, State's Exhibit 1, Petition to Enter a Plea of Guilty, at the evidentiary hearing, reflects the change in the agreement on page 4.

Last, the decision to request the drug treatment under the open plea was, in turn, premised on counsel's assurances that if the court did not impose treatment as a part of the sentence, Mr. Dobbins was eligible for and encouraged to believe that, after the successful completion of a substance abuse program while in the department of corrections, he could receive a sentence reduction as a consequence of entering the open plea of guilty. PCR. Tr. pp. 31, 33.

Before pleading guilty, a defendant is entitled to accurate advice as to the considerations governing the decision to plead guilty, including the sentencing options available to the judge. Drone v. State, 973 S.W. 2d 897, 902 (M0. App. 1998); Mo. Const. Art. 1 Sec. 10A; U.S. Const. Amend. XIV. While an attorney is not required to advise a client about collateral consequences of a plea of guilty, if the attorney does so, the advice must be accurate. Beal v. State, 51 S.W. 3d 454, 458 (Mo. App. 2001); Savage v. State, 114 S.W. 3d 454, 458 (Mo. App. 2003). The attorney's failure to advise the defendant correctly denies the defendant effective assistance of counsel .Garmon v. Lockhart, 938, F.2d 120 (8th Cir.); Strickland v. Washington, 466 U.S. 688, 687-88 (1984); U.S. Const. Amend. VI. Prejudice is shown if, but for the erroneous advice, the defendant would not have entered the guilty plea. Garmon v. Lockhart, 938 F. 3d 120 (1991).

"When a defendant claims to have pleaded guilty based on a mistaken belief about his sentence, the test is whether a reasonable basis exists in the record for such a belief." McNeal v. State, 910 S.W. 2d 767, 769 (Mo. App. 1995). If the plea was entered in reliance on such a reasonable belief, the defendant is entitled to withdraw his plea. Id

Mr. Dobbins's belief that he was eligible for a sentence reduction under Statute 558.046 is reasonable. In Brown v. Gammon, 947 S.W.2d 437, 441 (Mo. App. 1997) the court found that the petitioner was entitled to rely on the positive representation of the trial court that he would be released on probation after completing a drug program and spending 120 days in prison, and that his guilty plea was therefore rendered involuntary when he was not so released. Similarly, in Evans v. State, 28 S.W. 3d 434 (Mo. App. 2000), the court granted relief where, although there was no plea agreement, the defendant had a reasonable basis for believing that such an agreement existed.

A reasonable belief can be based on the advice of the defense attorney. This has been clear since this Court's decision in State v. Rose, 440 S.W.2d 441 (Mo. Banc 1969). For example, in Beal v. State, 51 S.W. 3d (Mo. App. 2001); and Copas v. State, 15 S.W. 3d 49 (Mo. App. 2000); the court remanded for an evidentiary hearing to determine whether trial counsel made misrepresentations on which the defendants relied in entering their pleas of guilty.

The motion court began its analysis of Mr. Dobbins's guilty plea claim by stating, "Essentially, Movant contends that his decision to enter a guilty plea was contingent solely upon his belief that ..... he would be eligible for a sentence reduction pursuant to Statute 558.046 (2000)." This is not Mr. Dobbins's contention. He asserts that his belief that he was eligible for such a reduction influenced his decision, and that he would not have decided to enter an open plea of guilty absent this belief. PCR. Tr. pp. 46, 58. The fact that he relied on this belief in making his decision is sufficient to require reversal here. McNeal v. State, 910 S.W. 2d 767, 769 (Mo. App. 1995); Hill v. Lockhart, 474 U.S. 52, 60 (1985).

The motion court further mischaracterizes the standard of review stating: "This court must determine whether or not that belief [that Mr. Dobbins was eligible for a sentence reduction] was reasonable in light of the potential adverse consequences of a trial." L.F. p. 41. But the adverse consequences of a trial are irrelevant to the determination of whether Mr. Dobbins's belief that he was eligible for a sentence reduction is reasonable.

There is no relationship between Mr. Dobbins's and trial counsel's corroborating testimonies produced at the evidentiary hearing and the motion court's hypostasizing of events, which in fact, never occur, from a trial that never, in fact, occurs.

For prejudice under Hill v. Lockhart, 877 F.2d 698 (8th Cir. 1989), the court states: "To succeed under Strickland, Hill need not show prejudice in a sense that he probably would have been acquitted or even given a shorter sentence at trial, but for his attorney's error[3] . All we need find here is a reasonable probability that the result of the plea process would have been different – that Hill would not have pleaded guilty and "would have insisted on going to trial." Hill, supora, 4747 U.S. at 59,106 S.Ct. at 370—if Hill's counsel had given accurate advice. Id at 704.

The motion court has not properly applied the standard of review to determine whether Mr. Dobbins's decision to enter the open plea is voluntary and not influenced by counsel's misrepresentations as to a sentence reduction.

In determining whether the movant's belief has a reasonable basis, the strength of the evidence against the movant and the fact that he might be prosecuted as a prior and persistent offender "were irrelevant to the question at hand: whether movant's reliance on defense counsel's representations in entering his plea was reasonable." Rick v. State, 934 S.W. 2d 601, 607 (Mo. App. 1996). In Rick the court found that the record established that the movant's decision to pled guilty was based on "defense counsels representations not because of the evidence against him (which, movant and

[3] In the case this was designated as footnote 12. Sometimes the court must consider how prejudicial the error would have been at trial-e.g., when the attorney fails to consider a possible defense, and accordingly advises the defendant to plead guilty. 474 U.S. 106 S.Ct. 370.

defense counsel conceded at the evidentiary hearing, strongly favored conviction)." Id.

The motion court found Mr. Dobbins's testimony that he relied on the possibility of a sentence reduction under statute 558.046 in deciding to plead guilty was not "believable." In the next sentence the motion court states that the decision was an "intelligent decision based upon appropriate and strategic advice of experienced counsel." L.F.p. 43.[4] Mr. Dobbins testified specificatelly that he relied on his counsel's representation that such relief was available, PCR. p. 46, 58, and trial counsel testified that he "encouraged him to think that would be an option." PCR.Tr.p. 33. This testimony was uncontroverted and, as such, makes the court's finding here clearly erroneous.

The motion court's observation that post-conviction counsel had conceded at the evidentiary hearing that the possibility of acquittal at trial was remote is incorrect. L.F. p. 41. Par.10. Actually, post-conviction counsel stated, "I think without the motion to suppress, in terms of at least of (sic)simple possession, it was going to be difficult to have Mr. Dobbins acquitted." PCR.Tr. p. 37. This difference is significant and the statement is not relevant under Rick or Hill. There is no basis in the record for the trial court's conclusion that Mr. Dobbins's testimony was not believable.

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[4] As discussed earlier Mr. Dobbins did not just enter a guilty plea. He entered an open plea on counsel's advice. This had the affect of waiving a trial and raising the sentence range from that of a Class B felony to a Class A.

Mr. Dobbins's belief that he would be eligible for a sentence reduction was based on a "positive representation upon which the movant is entitled to rely." Haskett v. State, 44 S.W. 3d 850, 857 (Mo. App. 2001). Mr. Dobbins testified that he relied on his trial counsel when counsel advised him that he was eligible for a sentence reduction. Trial counsel acknowledged giving that erroneous advice, and stated:

> And part of my advice was that even if that happens, even if you get a longer sentence than I hope you'll get, that we can come back and ask for a sentence reduction. Supp. L.F. p. 32. I also told Dale that I had had success in persuading several judges to grant sentence reductions in similar drug related cases. And so I encouraged him to think that would be an option. PCR. Tr. p. 33.

The motion court found that Mr. Dobbins had signed a "Petition to Enter a Plea of Guilty." L.F.p. 42. State's Exhibit 1, p. 4, par 13. The state claims that paragraph 13 effectively functions as a disclaimer to Mr. Dobbins's belief that he would be eligible for a latter sentence reduction under statute 558.046. In Johnson it was alleged that counsel was ineffective in that he advised Johnson that he would have to serve only four or five years before he would be eligible for parole. The court stated: "The paucity of the record before us, in part due to the court's sole reliance on the guilty plea petition, fails to refute Johnson's

allegations." Johnson v. State, 962 S.W. 2d 892 (Mo. App. E.D. 1998). In Driver v. State, 912 S.W. 2d 52 (Mo. Banc 1995), this court stated: "to preclude an evidentiary hearing, however, the rule 29.15 (b) (4) inquiry must be specific enough to elicit responses from which the motion court must determine that the record refutes conclusively the allegations of effectiveness asserted in the 29.15 motion."

The same holds true in Mr. Dobbins's case. During the plea the court did not inquire as to anything told to Mr. Dobbins that may have influenced his decision to enter the open plea of guilty. The court's reliance on the plea petition is misplaced.

In affirming the motion court's denial of Mr. Dobbins's Supreme Court Rule 24.035 motion, as to Point II, the Western District Court of Appeals states: "Having determined that appellant's trial counsel was deficient in that he did, in fact misrepresent to appellant, at the time of his plea, that he would be eligible for a sentence reduction, pursuant to statute 558.046, that does not entitle appellant to the post-conviction relief that he seeks." Memo. p. 11. In making this determination the Appellate Court found that, 1) the first prong of the Strickland test has been met, that counsel's advice fell below the accepted standards as required by the right to counsel under the Sixth Amendment. Strickland v. Washington, 106 S.Ct. 2052 (1984) and, 2) Mr. Dobbins's belief

that he was eligible for a sentence reduction was reasonable. (Reasonable belief) Rick v. State, 934 S.W. 2d 601 (Mo. App. 1996).

In determining prejudice to Mr. Dobbins the Appellate Court found: "Counsel considered going to trial as not being a viable option in that there was little hope for acquittal once the appellant's motion to suppress was overruled and if convicted, that the jury would be too unpredictable as to its sentence recommendation. Despite the Appellant's assertions now, it is reasonable to conclude, given all the circumstances, that he would have entered an open plea of guilty based solely on the advice of counsel that the Appellant had a good chance of receiving a lesser sentence than he would have received under the rejected plea agreement such that appellant was not prejudice by counsel's misrepresentations, with respect to being eligible for a sentence reduction pursuant to statute 558.046." Memo. p. 12.

The court's statements here, concerning trial and jury sentencing are not in the record nor will the record support them. It was after the motion to suppress was denied that the state's offer, not to file as a prior offender, was rejected. This placed Mr. Dobbins in the same procedural posture as he would have been in if he would have proceeded to trial. Instead Mr. Dobbins entered an open plea on counsel's representations that, if the court did not impose treatment, he was eligible for a sentence reduction. PCR. Tr. pp. 30, 31. He was not eligible

for jury sentencing [5] and ten years was now the statutory minimum sentence the court could impose, a lesser sentence than the state had offered was not available.

The court's conclusion is objectively unreasonable, and has not properly considered all the circumstances. Notwithstanding the most obvious of these, its own finding that counsel did in fact, misrepresent that he would be eligible for a sentence reduction. Memo. p. 11. Thus establishing that Mr. Dobbins had a reasonable belief of an early release.

The United States Supreme Court articulated the test for prejudice from an attorney's incorrect advice as to the consequences of a guilty plea in Hill v. Lockhart, 474 U.S. 52, 60 (1985). "[I]n order to satisfy the 'prejudice' requirement, the defendant must show that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." On remand, the Eighth Circuit noted that the decision must be made subjectively, not objectively:

This part of the Strickland test is evaluated subjectively, not objectively. That is, it does not matter whether a reasonable person would have pleaded differently; give the correct information of nine, instead of six, years. What counts is that the likelihood that Hill would have pleaded differently. Hill v. Lockhart, 877 F.2d 698 n.11 (8th Cir. 1989). Id at 703. Affd. On rehearing,

[5] As a prior drug offender Mr. Dobbins was not eligible for jury sentencing pursuant to statute 557.036. 4 (2).

894 F. 2d 1009 (8th Cir. 1990). In granting relief the court noted that "the misadvise was of a solid nature, directly affecting Hill's decision to plead guilty." Id at 1010.

The motion court here, however, clearly did consider whether a reasonable person would have pleaded differently in coming to the conclusion that Mr. Dobbins's testimony was not "believable." In making that determination, the court noted that "Movant was represented by experienced counsel, the evidence against him was overwhelming, and, as a prior drug offender, Movant's decision to plead guiltily was an intelligent decision..." L.F. p. 43.

As we see from Rick and Hill, in whether Mr. Dobbins would have proceeded to trial, it is not about the evidence against him nor is it about the length of sentence the court could impose. Even if it were, he has already exhibited his willingness to be sentenced by the court when he rejected the states plea offer, PCR Tr. p. 8, and exposed himself to a life sentence under the open plea. Supp. L. F. p. 69. Trial counsel's corroborating testimony at the evidentiary hearing was that, had he known of the unavailability of statue 558.046, he would "probably not" have recommended the open plea of guilty. PCR. Tr. pp. 10-11. That Mr. Dobbins placed importance on the statutes availability, PCR. Tr. p 21, and would want to file for a sentence reduction if he were give a harsh sentence. PCR. Tr. p. 23. Counsel informed Mr. Dobbins he could petition for a sentence reduction and encouraged him to believe he would

receive it. PCR. Tr. pp. 31-33. Mr. Dobbins stated that he did not believe that a sentence of life was a possibility because it had nothing to do with his offense. PCR. Tr. pp. 58-59. Had Mr. Dobbins not erroneously believed that he was eligible for a sentence reduction under statute 558.046, after successfully completing a substance abuse program while in the Department of Corrections, PCR. Tr. p. 56, he would not have entered an open plea of guilty and would have went to trial. PCR. Tr. 46. Rick v. State, 934 S.W. 2d 601 (Mo. App. 1996); Hill v. Lockhart, 877 F. 2d 698 (8th Cir. 1989).

As an alternative reason to proceed to trial Mr. Dobbins could have contested the element of intent to distribute. Neither Mr. Dobbins, nor the Grand Jury was told the actual weight of the evidence. See Indictment and Information substituted for Indictment, charging possession of more than 30 kilos of marijuana Supp. L. F. pp. 1, 6, and Highway Patrol Lab Report, showing actual weight of "cut plants" as 9.09 kilos. Supp. L.F. p. 85. Statute 195.010 (24) excludes the stalks of the cut plants as prosecutable material.

Under these circumstances Mr. Dobbins has a right to have a jury instruction on the lesser offense of possession of marijuana. State v. Mizanskey, 991 S.W. 2d 95 (Mo. App. 1995). Had Mr. Dobbins proceeded to trial he could have been acquitted of the distribution charge, a Class B felony, and convicted of the lesser charge of possession of marijuana, a Class C felony, preserving his right to appeal the denial of the Motion to Suppress.

As noted above, Mr. Dobbins has presented two alternatives for proceeding to trial. Here he will present a third alternative to the Appellate Court's assertion that despite Mr. Dobbins's assertion "he would have entered an open plea of guilty based solely on the advice of counsel that Appellant had a good chance of receiving a lesser sentence than he would have under the rejected plea agreement." Memo. p. 12. If Mr. Dobbins had not erroneously believed that he was eligible for a sentence reduction under statute 558.046, PCR. Tr. pp. 10, 21, 46, 56, Memo. p. 9, he would have accepted the state's plea offer, State's Exhibit 1, "Petition to Enter a Plea of Guilty" p. 4, pled guilty under the terms of the agreement and been sentenced by the court to ten years imprisonment. Under this premise Mr. Dobbins can show prejudice in that, under the open plea of guilty, he was sentenced to 18 years imprisonment. State v. Ayres, 93 S.W. 3d 827 (Mo. App. E.D. 2002).

In addition to the state cases cited above, federal court cases applying the Strickland standard to plea bargaining also require relief in this case. In Moore v. Bryant, 348 F. 3d 238, 242 (7th Cir. 2003), trial counsel was found ineffective for advising a client to accept the prosecutors recommendation of a twenty year sentence. The advice was based on an erroneous understanding of how a sentencing statute would apply to the defendant. The defendant suffered prejudice because he would not have entered a plea of guilty but for counsel's erroneous advice. Mr. Dobbins's case, as we see, is also similar to United States

v. McCoy, 215 F. 3d 102 (D.C.. Cir. 2000). In McCoy the defendant plead guilty upon the erroneous advice of his attorney that his sentencing range under the plea bargain would be shorter than it actually was. The court in Finch v. Vaughn, 67 F. 3d 909 (11th Cir. 1995), set aside a guilty plea where the defendant was told that his federal and state sentences would be concurrent, but in fact the federal government was not bound by the state plea agreement and had a policy that federal sentences would be served consecutively.

The longstanding test for determining the validity of a guilty plea is "whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant." Hill v. Lockhart, 106 S.Ct. 366, 369 (1985). The evidence establishes the two elements required for relief in this case: That Mr. Dobbins reasonably but incorrectly believed that he was eligible for a sentence reduction, and that he would not have entered an open plea of guilty had he not so believed. He is therefore entitled to withdraw his plea.

Because ineffective assistance of counsel rendered Mr. Dobbins's plea of guilty unknowing and therefore involuntary, he is entitled to relief. His plea must be set aside.

ARGUMENT POINT III

THE MOTION COURT ERRED IN REFUSING TO SET ASIDE MR. DOBBINS'S PLEA OF GUILTY IN THAT MR. DOBBINS'S CONVICTION VIOLATED HIS RIGHT TO DUE PROCESS OF THE LAW BECAUSE THE TRIAL COURT ACCEPTED HIS PLEA OF GUILTY WITHOUT DETERMINING THAT IT WAS SUPPORTED BY A FACTUAL BASIS.

Under Supreme Court Rule 24.02 (e) 'The court shall not enter a judgment on a plea of guilty unless it determines that there is a factual basis for the plea." A defendant may challenge the lack of a factual basis for a guilty plea in a Supreme Court Rule 24.035, motion. Saffold v. State, 982 S.W. 2d 749, 752 (Mo. App. 1998).

On appeal from the denial of motion to set aside judgment of conviction entered on plea of guilty, the question before the Supreme Court is "whether the findings, conclusions, and judgment of the trial court are clearly erroneous." State v. Rose, 440 S.W. 2d 441 S.Ct. (1969).

During the plea hearing in Mr. Dobbins's case the following exchange took place between Mr. Dobbins and the court:

Court Q. "you want to bring this matter to a conclusion today, because you are, in fact, guilty of the Class A felony of trafficking in the second degree, and the Class A misdemeanor of driving while suspended; is that correct?"

Mr. Dobbins A. "That's correct."

Court Q. "I'm sorry. It's actually the Class B felony of trafficking."

Mr. Stouffer (prosecutor). "It is the punishment is enhanced to the level of an A."

Court. "Okay. But it was charged, I think, originally as a Class A."

(By the court) Q. "And you also understand that it is as a prior and persistent offender?'

Mr. Dobbins A. "Yes."

Mr. Viets (Attorney for defendant). "Prior—I don't believe he is charged as a persistent offender."

Mr. Stouffer. "He's only a prior offender, Judge."

Supp. L. F. pp. 65-66.

It was at this point that the court should have recognized that Mr. Dobbins did not understand the charge. Trial counsel stood silent and the prosecutor states that the charge is for trafficking, Class B. A little further in the transcript and the state recites what the evidence would be if the matter were to go to trial.

Mr. Stouffer: "Judge, we expect that the evidence to be that on or about September 27, of last year in Saline County, Missouri, the defendant, with the intent to distribute, possessed more then five grams of marijuana, a controlled substance, knowing of its presents and nature." Supp. L.f. p. 67.

The state recited Mr. Dobbins's prior conviction and offered State's Exhibit 1. Sup. L.F. p. 67-68. The exhibit describes the seizure the of green marijuana and garden tools from Mr. Dobbins's vehicle. There was no discussion as to the contents of the exhibit and no evidence as to the weight of the marijuana was stated for the record. There were no scales, packaging materials, notations of drug transactions, cash, or other evidence seized indicative of distribution. This was the only evidence offered by the state as a factual basis at the guilty plea. Mr. Dobbins had signed a Petition to Enter a Plea of Guilty which contained a statement but, this statement was not part of the record from the hearing. States Exhibit 1, Petition to Enter a Plea of Guilty, p. 2. Still later in the transcript, the court introduces another alternative charge.

Court Q. "Is count 1 as originally charged, or in the alternative?"

Mr. Stouffer. "The alternative, Judge."

Court. "Okay. It's still ten to thirty or life."

Mr. Viets. "It is, Your Honor."

Court. "And that actually is committing the class B felony of possession of a controlled substance with the intent to distribute. Do you understand that?"

Mr. Dobbins. "Yes."

It was obvious that the Judge was not familiar with the facts of the case. Class A trafficking requires more than 100 kilos, Class B requires more than 30 kilos. The State is charging more than five grams of marijuana. Mr. Dobbins

9.09 kilos of cut plants. Supp. L. F. p. 85. The charge is for more than five grams of marijuana. Statute 195.010. (24), excludes the stalks of the plants as prosecutable material and the leaf of the plant is no more distributable than the stalk. The flower of the plant is the only part of the plant of any interest to the user. Mr. Dobbins was not aware of the weight stated in the lab report until sentencing. Supp. L.F. p. 43. Under the variances here the, the actual amount of substance attributable to this offense was relevant from the time of the indictment.

Mere possession of marijuana does not establish intent to distribute. State v. May, 71` S.W. 3d 177 (Mo. App. 2002). The amount of marijuana one person can smoke in one year is approximately ten pounds of marijuana. United States v. Murray, 753 F.2d 612 (1985). Green marijuana such as that seized here is only available to the user one time a year. Therefore, the inference that Mr. Dobbins must have intended to distribute the marijuana is not supported by the quantity.

In Jones v. State, 117 S.W. 3d 209, 212 (Mo. App. 2003), the court granted relief from a guilty plea under Supreme Court Rule 24.035, because the record at the guilty pleas hearing did not establish the factual basis for the plea. In particular, during the guilty plea hearing, neither the instrument used to commit the offense of aggravated assault, nor the extent of the victims physical injuries were identified. Although the complaint filed in the case, and the presentence

investigation report filed in a related case, did describe the injuries and the instrument, the complaint and the report were not considered at the guilty plea hearing. Because "The factual basis for the plea of guilty must be gleaned from the record of the guilty plea hearing," relief was required.

Also see Brown v. State, 45 S.W. 2d 506 (Mo. App. 2001) .(Defendant's testimony at the plea hearing did not include all the elements charged; relief granted); Carmons v. State, 26 S.W. 3d 382, 384 (Mo. App. 2000) ("If the facts presented at the guilty plea hearing do not establish the commission of the offense, the court should reject the plea.").

While a factual basis to support a plea of guilty is not required by the United States Constitution, Mr. Dobbins does have a right under Due Process and Equal Protection Clauses of the United States Constitution Fourteenth Amendment and Article 1, Section 10 of the Missouri Constitution, to have the state follow its own rules. See Evitts v. Lucy, 469 U.S. 387 (1985), (when a state provides a right, the Due Process Clause applies to the procedure to which it is administered). Those rules require that a guilty plea be supported by an adequate factual basis.

Because the factual basis of the plea was not established, this court, if relief is not granted in Point II above, should reform the judgment to reflect a conviction for possession of marijuana, and remand for resentencing. Cason v. State, 987 S.W. 2d 357, 359 (Mo. App. 1999), (Where plea proceeding did

the court identified the offense as "the Class B felony of trafficking." Supp. L.F. p. 1, 65. Trial counsel stood silent. Later, after the state had recited the evidence for trial, the court indicated it was accepting the plea for possession of a controlled substance with the intent to distribute. Supp. L.F. p. 69. The presentence report, prepared later, also stated that Mr. Dobbins had pled to a sentence of ten years and the Class B felony of trafficking second degree. Sup. L.F. p. 24. At sentencing once again the court states the charge as a Class B felony of trafficking. The prosecutor once again affirms the charge as trafficking. Supp. L.F. p. 35. There is some discussion about an alternative but nothing specific. The actual charge is never mentioned at sentencing.

In England v. State, 85 S.W. 3d 103, 110 (Mo. App. 2002), the court set aside a guilty plea where the factual basis presented did not include the mental element of the offense. The Court held, "Without this factual predicate, we cannot conclude that England understood the charge against him and voluntarily entered his plea of guilty on Count I."

Like England, the record in this case does not support the conclusion that there was a factual basis for the plea of guilty, and Mr. Dobbins is entitled to relief. Trial counsel did not call the court's attention to the fact that the record did not establish a factual basis for the plea. The discussion during the plea proceedings indicates confession about the offense to which Mr. Dobbins was

CONCLUSIOIN

For the foregoing reasons, Appellant prays the court:

(a) For the aforegoing reasons in Point I this court should place Mr. Dobbins on probation for a period of five (5) years and apply all jail and prison time over two years toward his probationary period.

In the alternative Mr. Dobbins's sentence should be vacated and he should be resentenced by a different court using proper sentencing considerations.

(b) For the reasons in Point II & III above, to vacate the conviction and sentence in Count I, and allow him to plead anew, or

(c) For the reasons in Point IV above, vacate his conviction and sentence, and remand to the trial court with instructions to enter a judgment of a lesser conviction for possession of marijuana and sentence him accordingly.

CERTIFICATE OF SERVICE

I hereby certify that two true and correct copies of the aforegoing Appellant's Amended Substitute Brief was sent First-class, U.S. Mail, postage prepaid, on this 19th, day of September, 2005, to:

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No. SC86737

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Plaintiff- Appellant

Vs.

State of Missouri
Defendant-Respondent

APPENDIX

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APPENDIX INDEX